(1)

83 - 1727

IN THE

Supreme Court of the United States

OCTOBER TERM, 1983

NO.

LOUIE L. WAINWRIGHT,
Secretary, Department
of Corrections, State
of Florida,

Petitioner,

-v-

ROBERT LARRY CROW,

Respondent.

PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

JIM SMITH
Attorney General

GREGORY C. SMITH
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51 pp

ISSUE

WHETHER THE ELEVENTH CIRCUIT PROPERLY HELD THAT FLORIDA'S PROSECUTION OF RESPONDENT FOR DEALING IN STOLEN PROPERTY, i.e., CONTRACTURAL RIGHTS OF RECORDING ARTISTS, IS PREEMPTED BY THE FEDERAL COPYRIGHT ACT.

TABLE OF CONTENTS

TABLE OF CITATIONS

TABLE OF CITATIONS (Cont'd)

Statutes

Other Authorities

IN THE

Supreme Court of the United States

OCTOBER TERM, 1983

NO.

LOUIE L. WAINWRIGHT,
Secretary, Department
of Corrections, State
of Florida,

Petitioner,

-v-

ROBERT LARRY CROW,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

The Attorney General of the State of Florida petitions this Court for a writ of certiorari to review the judgment of the United States Court of Appeals for the Eleventh Circuit in this case.

OPINIONS BELOW

The opinion on direct appeal from respondent's conviction is reported as Crow v. State, 392 So.2d 919 (Fla. 1st DCA

1980). The Florida Supreme Court's order denying respondent's petition to review that decision is reported as Crow v. State, 399 So.2d 1141 (Fla. 1981).

The opinion of the Court of Appeals, Eleventh Circuit, is reported as Crow v. Wainwright, 770 F.2d 1224 (11th Cir. 1983).

JURISDICTIONAL STATEMENT

The judgment of the Eleventh Circuit Court of Appeals was entered on December 2, 1983. Petition for Rehearing was denied on January 23, 1984.

This Court's jurisdiction is invoked pursuant to 28 U.S.C. § 1254(1).

STATUTORY AND OTHER PROVISIONS INVOLVED

Article VI §2 of the United States Constitution provides:

> This Constitution, and the laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution of Laws of any State to the Contrary notwithstanding.

17 U.S.C. § 301 provides:

> (a) On and after January 1, 1978, all legal or equitable rights that are equivalent to any of the exclusive rights within the general scope of copyright as specified by section 106 [17 USCS § 106] in works of authorship that are fixed in a tangible medium of expression and come within the subject matter of copyright as specified by sections 102 and 103 [17 USCS §§ 102 and 103], whether created before or after that date and whether published or unpublished, are governed exclusively by this title [17 USCS §§ 101 et seq.]. Thereafter, no person is entitled to any such

right or equivalent right in any such work under the common law or statutes of any State.

(b) Nothing in this title [17 USCS §§ 101 et seq.] annuls or limits any rights or remedies under the common law or statutes of any State with respect to--

(1) subject matter that does not come within the subject matter of copyright as specified by sections 102 and 103 [17 USCS §§ 102 and 103], including works of authorship not fixed in any tangible medium of expression; or

(2) any cause of action arising from undertakings commenced before January 1, 1978; or

(3) activities violating legal or equitable rights that are not equivalent to any of the exclusive rights within the general scope of copyright as specified by section 106 [17 USCS § 106].

(c) With respect to sound recordings fixed before February 15, 1972, any rights or remedies under the common law or statutes of any State shall not be annulled or limited by this title [17 USCS §§ 101 et seq.] until February 15, 2047. The preemptive provisions of subsection (a) shall apply to any such rights and remedies pertaining to any cause of action arising from

undertakings commenced on and after February 15, 2047. Notwithstanding the provisions of section 303 [17 USCS § 303], no sound recording fixed before February 15, 1972, shall be subject to copyright under this title [17 USCS §§ 101 et seq.] before, on, or after February 15, 2047.

(d) Nothing in this title [17 USCS §§ 101 et seq.] annuls or limits any rights or remedies under any other Federal statute.

Section 812.019, F.S., provides:

(1) Any person who traffics in, or endeavors to traffic in, property that he knows or should know was stolen shall be guilty of a felony or the second degree, punishable as provided in ss. 775.082, 775.083, and 775.084.

Section 812.012(3)(b), F.S., provides:

(3) "Property" means anything of value, and includes:

* * *

(b) Tangible or intangible personal property, including rights, privileges, interests, and claims.

STATEMENT OF THE CASE

A. History of the Case

Respondent was convicted and sentenced to a term of five years for the crime of dealing in stolen property, which consisted of "royalty rights and/or services" of several popular singers, in violation of § 812.019, F.S. The District Court of Appeal, First District, affirmed the judgment and sentence, 392 So.2d 919. Respondent petitioned the Florida Supreme Court to accept certiorari jurisdiction to review the opinion of the First District Court of Appeal. The Florida Supreme Court denied the petition on May 5, 1981. 399 So.2d 1141.

Petition for writ of habeas corpus was filed in federal district court on June 18, 1981. A report and recommendation was issued on January 27, 1982, recommending that

the petition should be denied on the merits. After an objection was filed by respondent, and a de novo review of the entire record was had, the petition was denied by the Honorable John H. Moore, II, United States District Judge.

On appeal, the Eleventh Circuit Court of Appeals reversed the lower court's denial of the petition and held that the prosecution of respondent was federally preempted. Petition for rehearing was denied on January 23, 1984.

B. Statement of the Facts

Respondent sold an unauthorized 8-track tape recording of an album by Tammy Wynette entitled "Golden Ring." The copyright to the album was the property of Columbia Broadcasting System, pursuant to a contract between Wynette and CBS dated January 1,

1975. Wynette was to receive monies from CBS for each copy of the recording sold.

Respondent did not contest the fact that he knowingly sold an unauthorized copy of the tape without paying royalties to CBS or compensation to Wynette.

REASONS FOR GRANTING THE WRIT

By an expansive reading of 17 U.S.C. § 301(a), the Eleventh Circuit Court of Appeals incorrectly held that the state prosecution for dealing in stolen property, i.e., contractual rights belonging to recording artists, was preempted by the federal copyright act.

In affirming respondent's direct appeal, the First District Court of Appeal stated:

> [T]he appellant was not charged with engaging in "bootleg" activities. Instead, he was charged with dealing in stolen royalty rights and/or services, which belonged to various performers, not under federal copyright law, but under various private contracts. These private contractual rights constitute property, see Section 812.012(3)(b), Florida Statutes, that are not within the ambit of the federal copyright law.

Crow v. State, 392 So.2d 919, 920 (Fla. 1st DCA 1980).

This Court made it clear in Goldstein v. California, 417 U.S. 546 (1973), that, to the extent that the federal copyright act leaves an area unregulated, the states are free to legislatively protect recordings from record piracy. The recording in Goldstein, supra, was fixed prior to the effective date of the legislation which respondent herein argues preempted his state prosecution. However, the principle of Goldstein applies. The federal legislation does not regulate those contractual rights still retained by an artist after the copyright has been sold to a recording company. Tammy Wynette still held the contractual right to be paid for each copy of her work sold. By petitioner's act, he deprived her of those monies, and thus dealt in stolen property. This property can be protected by state legislation.

The lower court held that 17 U.S.C. § 301(a) clearly evinced Congress' intent to statutorily overrule Goldstein v. California. The petitioner disagrees. A federal court's duty has always been to reconcile federal law with the states' statute, if possible. Merrill Lynch, Pierce, Fenner & Smith v. Ware, 414 U.S. 117 (1973).

The right retained by the artist is a contractual one. Wynette had exchanged her copyright for a contractual right to receive money. If an interloper interferes with that contractual right, such that the artist does not receive her contractual payment, he has deprived her of a valuable commodity which is defined by common law.

In Aronson v. Quick Point Pencil Company, 440 U.S. 257 (1979), the inventor of a novel key chain sued the company who

agreed to make the key chain, for royalties, even though the inventor was unable to get a patent for the product. This court stated:

> Commercial agreements traditionally are the domain of state law. State law is not displaced merely because the contract relates to intellectual property which may or may not be patentable. States are free to regulate the use of such intellectual property in any manner not inconsistent with federal law.

Id. at 262.

The Eleventh Circuit properly found that Section 301 provides a two-pronged test for preemption.

> 1) Whether the work in question is within the subject matter.
>
> 2) Whether the rights are the equivalent to those protected by the federal legislation.

The court concluded that the contractural rights here which were the subject of the prosecution below met both tests. As in

Aronson, supra, the rights were contractual and not within the subject matter of the act. Thus, the Eleventh Circuit erred in finding that the first test was satisfied. Secondly, the copyright had been sold to CBS, and it was the remaining contract rights which were the subject of the prosecution, not rights equivalent to copyright.

The Eleventh Circuit held that the contractual rights of the artist which she still retained, are equivalent to those protected by the federal copyright act. The court took this position on the basis of the fact that Crow could not be sued in contract by the copyright holder. The court characterizes the property rights as those of CBS "to distribute copies or phono records of the copyrighted work" and "to reproduce the copyrighted work." 17 U.S.C.

§ 106(1) and (3) (1976). Such a description of the property Crow "dealt in" falls wide of the mark. Respondent was not charged with dealing in the property of CBS. Wynette had sold CBS the rights described above. Simply because the property Wynette "sold" is defined by federal legislation cannot transform the money she received for that property, into the equivalent of copyright.

The Eleventh Circuit cites an example. If the recording was not protected, but CBS had agreed to pay an amount for every sale of her work, then the hypothetical states that there is no property to be stolen and thus a state prosecution would be impossible. This is not so. The artist has been injured in her ability to recover under the contract and she may sue in tort for intentional interference with a

business relationship. See Wackenhut Corp. v. Maimone, 389 So.2d 656 (Fla. 4th DCA 1980); John Reid and Associates, Inc. v. Jimenez, 181 So.2d 575 (Fla. 3d DCA 1965). Florida has acknowledged such interference is depriving a payee of a valuable right. The prosecution for dealing in such property is not preempted.

There is a substantial public interest recognized by the State of Florida in prosecuting persons dealing in this type of stolen property. The right to receive monies for each copy of a work sold provides the incentive for the production of that work. In Zacchini v. Scripps-Howard Broadcasting Company, 433 U.S. 562 (1977), the owner of a circus act sued a television station for filming his act without permission, claiming that the filming violated his "right to publicity." The plaintiff

claimed that he had been deprived of a "valuable part of the benefit which may be attained by his talents and efforts." Id. at 569. This court acknowledged the state's interest in protecting the "economic incentive for him to make the investment required to produce the performance of interest to the public." Id. at 576.

The First Circuit has recognized what the Eleventh Circuit has not:

> [That] Supreme Court cases of the last decade demonstrate a new solicitude toward state interests and an elevation of the threshold of conflict required before a state statute is preempted.

Agency Rent-a-Car, Inc. v. Connolly, 686 F.2d 1029, at 1038 (1st Cir. 1982).

It is imperative that this Court address the issue here presented. The preemption of a state prosecution intended to protect the interests of its citizens is a severe step, and we contend an unnecessary one.

CONCLUSION

For these reasons, petitioner respectfully urges this Court to grant certiorari and reverse the holding of the Circuit Court of Appeals for the Eleventh Circuit.

JIM SMITH
Attorney General

By_____
GREGORY C. SMITH
Assistant Attorney General

COUNSEL FOR PETITIONER

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CERTIFICATE OF SERVICE

I hereby certify that on this _____ day of April, 1984, copies of this Petition for Writ of Certiorari were mailed, postage prepaid, to Ms. Elizabeth L. White, and to Mr. William J. Sheppard, Law Offices of William J. Sheppard, P.A., 215 Washington street, Jacksonville, Florida 32202, Counsel for Respondent. I further certify that all parties required to be served have been served.

GREGORY C. SMITH
Assistant Attorney General

of Counsel

APPENDIX

Robert Larry CROW, Petitioner,

v.

Louie L. WAINWRIGHT, Secretary Department of Corrections, State of Florida, Respondent.

No. 82-3158.

United States Court of Appeals, Eleventh Circuit.

Dec. 2, 1983.

Appeal from the United States District Court for the Middle District of Florida.

Before TJOFLAT and HILL, Circuit Judges, and SIMPSON, Senior Circuit Judge.

JAMES C. HILL, Circuit Judge:

Robert Larry Crow appeals to this court from the district court's denial of his petition for a writ of habeas corpus. The State of Florida tried Crow in October, 1979, for selling "bootleg" eight-track tapes in violation of Fla.Stat.Ann. § 812.019 (West Supp. 1983) (prohibiting dealing in stolen property). The jury con-

victed Crow, and the trial judge sentenced him to five years in prison. Crow contends that we should hold the state conviction null and void because the Copyright Act, 17 U.S.C. § 101 **et seq.** (1976) (the "Act"), preempts Florida's regulation of his activities in this case. Crow's contention is valid; we therefore reverse this case and remand it to the district court with instructions to grant the writ of habeas corpus.

The evidence at trial revealed that Crow, on April 25, 1979, sold an eight-track tape recording of an album by Tammy Wynette entitled "Golden Ring." Columbia broadcasting System (CBS) owned the copyright to the album by virtue of a contract between Wynette and CBS dated January 1, 1975; the album was copyrighted in 1976. Crow does not contest the jury's findings

that he "pirated" the recording and sold the tape without paying royalties to CBS. He argues simply that, because the only "stolen property" involved in the case was the copyright of CBS (and not the physical tape itself), the Copyright Act precludes Florida from prosecuting him and renders his conviction void. The state trial and appellate courts rejected this claim. **See Crow v. State,** 392 So.2d 919 (Fla.Dist.Ct.App. 1980), **aff'd,** 399 So.2d 1141 (Fla. 1981). Having exhausted his state remedies, Crow is properly before this court.

Section 301 of the Act controls our decision. It states:

> On and after January 1, 1978, all legal or equitable rights that are equivalent to any of the exclusive rights within the general scope of copyright as specified by section 106 and works of authorship that are fixed in a tangible medium of

> expression and come within the subject matter of copyright as specified by sections 102 and 103, whether created before or after that date and whether published or unpublished are governed exclusively by this title. Thereafter, no person is entitled to any such right or equivalent right in any such work under the common law or statutes of any state.

17 U.S.C. § 301(a) (1976). The legislative history of section 301, which Congress passed in 1976, clearly evidences Congress' intent to overrule by statute cases such as **Goldstein v. California,** 412 U.S. 546, 93 S.Ct. 2303, 37 L.Ed.2d 163 (1973) (holding that the Copyright Act of 1909 preempts only state laws **conflicting** or **interfering with** its provisions). The Report of the House of Representatives states:

> The intention of section 301 is to preempt and abolish any rights under the common law or statutes of a state that are **equivalent to copyright** and that **extend to works coming within the scope of the federal copyright law.** The de-

> claration of this principle in section 301 is intended to be stated in the clearest and most unequivocal way possible, so as to foreclose any possible misinterpretation of its unqualified intention that Cognress should act preemptively, and to avoid the development of any vague borderline area as between State and Federal protection.

H.R.Rep. No. 94-1476, 94th Cong., 2d Sess. 130 (1976), **reprinted in** 1976 U.S.Code Cong. & Ad.News 5659, 5746. Thus, we must determine in this case not whether Florida's prosecution of Crow conflicts with the provisions of the Copyright Act, but whether Crow's actions violated rights "equivalent to any of the exclusive rights within the ... scope of copyright ...." 17 U.S.C. § 301(a); **see also Ray v. Atlantic Richfield Co.,** 435 U.S. 151, 157, 98 S.Ct. 988, 994, 55 L.Ed.2d 179 (1978) (court must determine whether Congress has "explicitly preempted state laws).

Section 301 in effect establishes a two-pronged test to be applied in preemption cases.[1] We must decide whether the rights at issue fall within the "subject matter of copyright" set forth in sections 102 and 103 and whether the rights at issue are "equivalent to" the exclusive rights of section 106. **Harper & Row, Publishers v. Nation Enters.**, 501 F.Supp. 848, 850 (S.D.N.Y. 1980). The recording "Golden Ring" certainly falls within the scope of section 102(a)(7), which provides copyright protection for "sound recordings." Thus, we need only determine whether the rights at issue are equivalent to section 106 rights.

The state supports its argument that it can constitutionally[2] prosecute Crow by attempting to characterize the stolen property rights as contract rights not within

the exclusive scope of section 106. These rights, argues the state, "'belong to various performers, not under federal copyright law but under various private contracts.'" Brief of Appellee at 4, **citing Crow v. State,** 392 So.2d 919, 920 (Fla.Dist.Ct.App. 1980). We do not accept this argument. CBS, the copyright holder, cannot maintain an action against Crow under state contract law because Crow was not a party to the contract by which CBS purchased the rights to "Golden Ring" from Wynette. Conversely, Crow neither sold nor purchased a right of action under the CBS/Wynette contract. The stolen property rights sold by Crow were the rights of CBS exclusively "to distribute copies or phono records of the copyrighted work" and "to reproduce the copyrighted work." 17 U.S.C. § 106(1) & (3) (1976 Supp. I). Given the

fact situation in this case, the Copyright Act clearly affords CBS its sole remedy should it bring an action against Crow.

An example illustrates this point. Suppose the recording "Golden Ring" could not have been copyrighted but that CBS nevertheless, for purposes of this example, contracted to pay Wynette a royalty for each tape sold. Without the protection of the Act, CBS would have no action against Crow. Although state contract law could constitutionally supply the rule of decision should Wynette sue CBS for breach of contract, **see Aronson v. Quick Point Pencil Co.**, 440 U.S. 257, 799 S.Ct. 1096, 59 L.Ed.2d 296 (1979), state contract law both could not and would not allow CBS to prohibit Crow from selling recordings of "Golden Ring." **See Harper & Row**, 501 F.Supp. 848.

The proper method of analysis is to examine whether the elements of a cause of action for the tort of copyright infringement are equivalent to the elements of the crime of dealing in stolen property as it applies in this case. **See** 1 Nimmer on Copyright, § 1.01[b]. Despite the name given the offense, the elements essential to establish a violation of the Florida statute in this case correspond almost exactly to those of the tort of copyright infringement. The state criminal statute differs only in that it requires the prosecution to establish scienter, which is not an element of an infringement claim, on the part of the defendant. This distinction alone does not render the elements of the crime different in a meaningful way.[3] Section 506 of the Copyright Act, which sets forth criminal penalties for copyright

infringement, also requires the prosecution to prove scienter as an element of the case. **See United States v. Smith**, 686 F.2d 234 (5th Cir. 1982). The additional element of scienter traditionally necessary to establish a criminal case merely narrows the applicability of the statute. The prohibited act--wrongfully distributing a copyrighted work--remains the same. **See Harper & Row**, 501 F.Supp. at 853-54 ("additional elements of 'knowledge' and 'intent' required under state law do not afford ... rights ... 'different in kind' from those protected by the copyright laws").[4]

Section 301 clearly prohibits Florida from prosecuting Crow in this case, and we conclude that Crow's conviction is null and void. We therefore REVERSE this case and REMAND it to the district court with in-

structions to grant the writ of habeas corpus.

---

[1] Section 301 applies only to violations occurring after January 1, 1978; it also applies only to rights "fixed in a tangible medium of expression" after February 15, 1972. 17 U.S.C. § 301 (1976). These requirements are satisfied in this case. The evidence at trial showed that the sale of the bootleg tape occurred in 1979 and that the recording was "fixed in a tangible medium of expression" and copyrighted after 1972.

[2] If section 301 prohibits the state from prosecuting Crow, the Supremacy Clause of the United States Constitution will render the conviction void. U.S. Const., art. VI, § 2.

[3] Professor Nimmer also reaches this conclusion. He states, "state record piracy laws are preempted in their application to ... sound recordings under the rules set forth in section 301(a)." 1 Nimmer on Copyright, § 101[b] (footnote omitted) (citing section 653h of the California Penal Code).

[4] In **Roy Export Co. v. CBS**, 503 F.Supp. 1137 (S.D.N.Y. 1980), **aff'd**, 672 F.2d 1095 (2d Cir.), **cert. denied**, ___U.S.___, 103 S.Ct. 60, 74 L.Ed.2d 63 (1982), the court held that section 301 of the Copyright Act does not preempt the New York law of unfair competition because the New York law re-

quires the plaintiff to allege unfairness and an unjustifiable attempt to profit from another's expenditure of time, labor and talent in order to state a cause of action. The logic underlying this decision has been questioned. **See** 1 Nimmer on Copyright, 1.01[b][1]. In any event, the court in **Roy Export** addressed the preemption of an unfair competition law, and **Roy Export** therefore does not control the decision in this case.

NO. 82-3158

UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

ROBERT LARRY CROW,

Appellant,

-v-

LOUIE L. WAINWRIGHT,
Secretary, Department of
Corrections, State of
Florida,

Appellee.

_____/

On Appeal from the United States
District Court
For the Middle District of Florida
Jacksonville Division

PETITION FOR REHEARING

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Tallahassee, FL 32301-8048
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CERTIFICATE OF INTERESTED PERSONS

The persons interested in this case are:

Appellant Robert Larry Crow

Appellee, Louie L. Wainwright, Secretary, Department of Corrections, State of Florida

TABLE OF CONTENTS

TABLE OF CITATIONS

Cases

PETITION FOR REHEARING

Appellee, Louis L. Wainwright, Secretary of the Department of Corrections, State of Florida, petitions this court to rehear the decision rendered by this court on December 2, 1983. In support of this request, the state would demonstrate that in deciding this case, this court overlooked or misapprehended certain issues which are hereby offered for consideration.

Upon reading the opinion of this court, it is clear that this court focused on the rights of the copyright holder, Columbia Broadcasting System (CBS). This court stated:

> The state supports its argument that it can constitutionally prosecute Crow by attempting to characterize the stolen property rights as contract rights not within the exclusive scope of § 106. These rights, argues the state, "'belong to various performers, not under federal copyright law but under

> various private contracts.'" Brief 2d 919, 920 (Fla.Dist.Ct.App. 1980). We do not accept this argument. CBS, the copyright holder, cannot maintain an action against Crow under state contract law because Crow was not a party to the contract by which CBS purchased rights to the "golden ring" from Wynette. Conversely, Crow neither sold nor purchased a right of action under the CBS/Wynette contract. The stolen property rights sold by Crow were the rights of CBS exclusively "to distribute copies of phono records of the copyrighted work" and "to reproduce the copyrighted work."

Instead, the State of Florida argues that the contract rights of the artist, Tammy Wynette, were the subject of the state prosecution. The State of Florida charged appellant with trafficking in stolen property. The state appellate court concluded that the rights of Tammy Wynette to monies for each recording sold, amounted to property which could be the subject of the state prosecution. The question of

whether CBS has been deprived of rights under a contract was never addressed, and this court's opinion misconstrues the state's argument.

In Aronson v. Quick Point Pencil Company, 440 U.S. 57 (1979), the Supreme Court stated:

> Commercial agreements are traditionally the domain of state law. State law is not displaced merely because the contract relates to intellectual property which may or may be patentable. States are free to regulate the use of such intellectual property in any manner not inconsistent with federal law.

Id. at 262. The State of Florida had the right to prosecute appellant for dealing in the stolen property of another, Tammy Wynette's contract right to receive compensation from the sale of the recording. The United states Supreme Court has recognized the state's interest in protecting such rights when to do so does not interfere

with federal legislation. Goldstein v. California, 412 U.S. 546 (1973).

In Agency Rent-a-Car, Inc. v. Connolly, 686 F.2d 1029 (1st Cir. 1982), the First Circuit Court of Appeals recognized that the recent Supreme Court cases "demonstrate a new solicitude toward state interests and an elevation of the threshold of conflict required before a state statute is pre-empted." Id. at 1038. This court should reexamine its opinion in light of Agency Rent-a-Car, since the state statute here can peacefully coexist with the federal copyright law.

Recently, there have been several state prosecutions for stealing or dealing in the property rights of recording artists. The state would list the three cases known to it where the state has upheld such a pro-secution.

1. People of the State of California v. Leslie Szarvas, California Superior Court, Pasadena, conviction entered 1/29/82

2. People of the State of Illinois v. Salem Arsham Zakarian, Wahi Karabit, Faried Saba, Cook County Municipal Court, Chicago, convicted on 4/20/82

3. People of the State of New York v. William Kamarra, Sup.Ct. of State of N.Y., County of Queens, convicted on 11/15/83

In each of these cases it was held that the defendant was guilty of larceny by his manufactured distribution of pirated post-1972 sound recordings, which thereby resulted in a theft of royalties due the artist whose performances were illegally produced thereon.

CONCLUSION

Appellee, Louie L. Wainwright, respectfully requests this Honorable Court rehear the opinion rendered on December 2,

1983, so that a reexamination of the case can be made in the perspective that the rights stolen were those due Tammy Wynette, not the copyright holder, CBS. In that perspective, appellee would maintain that this court should allow the state prosecution for trafficking in stolen property; contract rights due Tammy Wynette.

JIM SMITH
Attorney General

s/s_____
GREGORY C. SMITH
Assistant Attorney General

COUNSEL FOR APPELLEE

The Capitol
Tallahassee, FL 32301-8048

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that I have furnished a copy of the foregoing Petition for Rehearing to Ms. Elizabeth L. White, and Mr. William J. Sheppard, Law Offices of

William J. Sheppard, P.A., 215 Washington Street, Jacksonville, Florida 32202, by .S. Mail, this 21st day of December, 1983.

s/s_____
GREGORY C. SMITH
Assistant Attorney General

of Counsel

Robert Larry CROW, Appellant,

v.

STATE of Florida, Appellee.

No. SS-321.

District Court of Appeal of Florida,
First District.

Nov. 17, 1980.

Rehearing Denied Feb. 13, 1981.

Nancy A. Daniels, Asst. Public Defender, Tallahassee, for appellant.

Jim Smith Atty. Gen. and Doris E. Jenkins, Asst. Atty. Gen., Tallahassee, for appellee.

THOMPSON, Judge.

The appellant was charged with trafficking in stolen property, which consisted of the "royalty rights and/or services" of several popular singers. After a jury trial, the appellant was convicted and he now appeals his conviction. We affirm.

[1] The appellant initially argues that the State's prosecution of this case was unconstitutional because the activity of dealing in "bootlegged" tape recordings is controlled exclusively by federal copyright laws. See 17 U.S.C. §§ 106-118, 301, 501-510. However, the appellant was not charged with engaging in "bootleg" activities. Instead, he was charged with dealing in stolen royalty rights and/or services, which belonged to various performers, not under federal copyright law, but under various private contracts. These private contractual rights constitute property, see §812.012(3)(b), Fla.Stat., that are not within the ambit of the federal copyright law.

[2] The appellant also argues that because the State failed to file an information until 149 days after his arrest, his right to due process was abrogated. However, the ap-

pellant failed to move for a continuance chargeable to the State. **See Mulryan v. Judge, Division "C" Circuit Court of Okaloosa County,** 350 So.2d 784 (Fla. 1st DCA 1977); **State ex rel. Wright v. Yawn,** 320 So.2d 880 (Fla. 1st DCA 1975), **cert. den.** 334 So.2d 609 (Fla. 1976). Instead, the appellant filed a written document with the court, wherein he stated that he waived his right to move for a continuance, "notwithstanding that his attorney has advised him that he should move to continue the cause until he has had the opportunity to properly prepare the case for trial." Accordingly, the appellant cannot properly complain on this appeal that his right to due process has been denied, since his waiver of his right to a continuance was clearly not coerced. **See Sumbry v. State,** 310 So.2d 445 (Fla. 2d DCA 1975).

We have considered the other points raised by the appellant and find them to be without merit. Therefore, the judgment of conviction is affirmed in its entirety.

MILLS, C. J., and McCORD, J., concur.

(2)

No. 83-1727

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1983

LOUIE L. WAINWRIGHT,
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Respondent.

ON PETITIONS FOR A WRIT OF
CERTIORARI TO THE UNITED STATES
COURT OF APPEALS FOR THE
ELEVENTH CIRCUIT

BRIEF FOR RESPONDENT IN OPPOSITION

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34 pp

ISSUE

WHETHER THIS COURT SHOULD INVOKE ITS CERTIORARI JURISDICTION TO REVIEW THE DECISION OF THE ELEVENTH CIRCUIT COURT OF APPEALS BELOW WHICH HELD THAT THE STATE COURT PROSECUTION OF RESPONDENT FOR SELLING COUNTERFEIT SOUND RECORDINGS PROTECTED BY THE FEDERAL COPYRIGHT ACT WAS PREEMPTED BY 17 U.S.C. § 301 AND RELEVANT CONSTITUTIONAL PROVISIONS.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

TABLE OF AUTHORITIES cont.

No. 83-1727

IN THE

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OCTOBER TERM, 1983

LOUIE L. WAINWRIGHT,
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ROBERT LARRY CROW,

Respondent.

ON PETITIONS FOR A WRIT OF
CERTIORARI TO THE UNITED STATES
COURT OF APPEALS FOR THE
ELEVENTH CIRCUIT

BRIEF FOR RESPONDENT IN OPPOSITION

CONSTITUTIONAL AND STATUTORY PROVISIONS

Article I, § 8 of the United States Constitution provides in pertinent part:

> This Congress shall have Power ...To promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive right to their respective writings and discoveries...

Article VI of the United States Constitution provides in pertinent part:

> This Constitution, and the laws of the United States which shall be made in pursuance thereof; and all Treaties made, or which shall be made, under the authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.

17 U.S.C. § 106 provides:

> Subject to sections 107 through 118 [17 USCS §§ 107-118], the owner of copyright under this title [17 USCS §§ 101 et seq.] has the exclusive rights to do and to authorize any of the following:

(1) to reproduce the copyrighted work in copies or phonorecords;

(2) to prepare derivative works based upon the copyrighted work;

(3) to distribute copies or phonorecords of the copyrighted work to the public by sale or other transfer of ownership, or by rental, lease, or lending;

(4) in the case of literary, musical, dramatic, and choreographic works, pantomimes, and motion pictures and other audiovisual works, to perform the copyrighted work publicly; and

(5) in the case of literary, musical, dramatic, and choregraphic works, pantomimes, and pictorial, graphic, or sculptural works, including the individual images of a motion picture or other audiovisual work, to display the copyrighted work publicly.

17 U.S.C. § 301 provides:

(a) On and after January 1, 1978, all legal or equitable rights that are equivalent to any of the exclusive rights within the general scope of copyright as specified by section 106 [17 USCS § 106] in works of authorship that are fixed in a tangible medium of expression and come within the subject matter of copyright as specified by sections 102 and 103 [17 USCS §§ 102 and 103], whether created before or after that date and whether published or unpub-

lished, are governed exclusively by this title [17 USCS §§ 101 et seq.]. Thereafter, no person is entitled to any such right or equivalent right in any such work under the common law statutes of any State.

(b) Nothing in this title [17 USCS §§ 101 et seq.] annuls or limits any rights or remedies under the common law or statutes of any State with respect to--

(1) subject matter that does not come within the subject matter of copyright as specified by sections 102 and 103 [17 USCS §§ 102 and 103], including works of authorship not fixed in any tangible medium of expression; or

(2) any cause of action arising from undertakings commenced before January 1, 1978; or

(3) activities violating legal or equitable rights that are not equivalent to any of the exclusive rights within the general scope of copyright as specified by section 106 [17 USCS § 106].

(c) With respect to sound recordings fixed before February 15, 1972, any rights or remedies under the common law or statutes of any State shall not be annulled or limited by this title [17 USCS §§ 101 et seq.] until February 15, 2047. The preemptive provisions of subsection (a) shall apply to any such rights and remedies pertaining to any cause of action arising from undertakings commenced on and after February 15, 2047. The preemptive provisions of

of subsection (a) shall apply to any such rights and remedies pertaining to any cause of action arising from undertakings commenced on and after February 15, 2047. Notwithstanding the provisions of section 303 [17 USCS § 303], no sound recording fixed before February 15, 1972, shall be subject to copyright under this title [17 USCS §§ 101 et seq.] before, on, or after February 15, 2047.

(d) Nothing in this title [17 USCS §§ 101 et seq.]annuls or limits any rights or remedies under any other Federal statute.

17 U.S.C. § 506 (a) provides:

Any person who infringes a copyright willfully and for purposes of commerical advantage or private financial gain shall be fined not more than $10,000 or imprisoned for not more than one year, or both: Provided, however, That any person who infringes willfully and for purposes of commercial advantage or private financial gain the copyright in a sound recording afforded by subsections (1),(2), or (3) of section 106 [17 USCS § 106(1),(2), or (3)] or the copyright in a motion picture afforded by subsections (1),(3), or (4) of section 106 [17 USCS § 106(1),(3) or (4)] shall be fined not more than $25,000 or imprisoned for not more than one year, or both, for the first such

offense and shall be fined not more than $50,000 or imprisoned for not more than two years, or both, for any subsequent offense.

STATEMENT OF THE CASE

Respondent was charged by information in a Florida State court and subsequently convicted of the offense of "dealing in stolen property" for his particpation in the sale on April 25, 1979, of "bootleg" or "counterfeit" 8-track tape recordings of Ms. Tammy Wynette. 1/ Such recordings were the unauthorized recordings of Ms. Wynette's sound performances, which were protected by 17 U.S.C. §§ 101 et. seq., also known as the Federal Copyright Act. By definition, such recordings were "unauthorized" solely because they were protected by the Act.

1/ The particular sound recording at issue, "Golden Ring" was fixed after February 15, 1972.

Under the terms of the charging instrument, the stolen property in which Mr. Crow was "dealing" consisted of the "royalty rights" owing to Ms. Wynette under the terms of her contract with CBS. In prosecuting respondent, the State of Florida did not seek to establish that Mr. Crow was a party to the contract between Ms. Wynette and CBS, but rather argued that Mr. Crow's unauthorized reproduction deprived Ms. Wynette of royalty rights she would have received under the terms of the contract had he not reproduced her work.

Respondent contended throughout the proceedings below that, by amending the Federal Copyright Act specifically to include 17 U.S.C. § 301, Congress had preempted the legislative field with regard to acts involving the sale of federally copyrighted and protected

materials. Accordingly, any state prosecution of Mr. Crow for his unauthorized reproduction and sale of those materials was preempted by the federal Act. Although this contention was rejected by the state court and the federal district court below, the Eleventh Circuit Court of Appeals agreed and vacated respondent's conviction. Crow v. Wainwright, 720 F.2d 1224 (11th Cir. 1983).

SUMMARY OF THE ARGUMENT

The Court should not invoke its certiorari jurisdiction in the instant case inasmuch as there is no conflict between the decision below and any opinion of this Court or of any other circuit court of appeals. The cases cited by petitioner for the general proposition that the pre-emption doctrine is not a favored one are inapplicable because they do not address the construction to be given Article I, § 8 and Article VI of the United States Constitution and 17 U.S.C. § 301. Congress has explicitly expressed its intent to preempt state law which protect those rights already protected by the Federal Copyright Act.

The case of Goldstein v. California, 412 U.S. 546 (1973) does not create jurisdiction. Goldstein was decided prior to the enactment of 17 U.S.C. § 301. In

Goldstein, this Court held that Congress was free to preempt State copyright law by expressing its intent to preempt such law, but further held that Congress had failed to do so. In response, Congress did express its intent by enacting 17 U.S.C. § 301. Thus, preemption is proper.

In addition, Florida state law does not conflict with the decision of the Eleventh Circuit in the instant case. In State v. Gale Distributors, 349 So.2d 150 (Fla. 1977), the state's highest court 2/ specifically held that a state statute prohibiting the unauthorized duplication of sound recordings fixed prior to February 15, 1972, the effective date of amendment to the Federal Copyright

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2/ Respondent's conviction was not reviewed by the Florida Supreme Court.

Act, was not preempted soley because Congress had expressed its intent not to preempt state laws relating to sound recordings fixed prior to February 15, 1972. In doing so, the court explicitly recognized that had Congress expressed its intent to preempt, such preemption would occur.

17 U.S.C. § 301 provides that all creative works which come within the subject matter of the Federal Copyright Act are to be governed exclusively by that law. The statute is further explicit in its terms that, after January 1, 1978, no person is entitled to any such equivalent right under state law.

The legislative history of the Federal Copyright Act likewise establishes the clear intent of Congress to provide a uniform system of the enforcement of

copyrights. Thus, any state laws seeking to enforce such rights are null and void.

The Eleventh Circuit correctly concluded that the right sought to be vindicated by state prosecution of respondent's activities was equivalent to the rights established under the Federal Copyright Act. The court's decision does not conflict with the established precedent of this or other courts. Accordingly, the invocation of jurisdiction herein is not appropriate.

ARGUMENT

The petitioner seeks to invoke this Court's jurisdiction in this case by arguing that the decision of the Eleventh Circuit below incorrectly applied the doctrine of preemption in determining the validity of respondent's prosecution for "dealing in stolen property." Despite the fact that the property "stolen" was the royalty rights of Ms. Tammy Wynnette, protected as to respondent solely pursuant to the Federal Copyright Act, it argues that the preemption doctrine is inapplicable.

In seeking to invoke this Court's jurisdiction petitioner does not and cannot demonstrate an appropriate basis for this Court's jurisdiction, but instead argues that preemption "is a

severe step, and we contend an unnecessary one." [Petitioner's brief at p. 17]. Such ground does not support an invocation of this Court's jurisdiction. Contrary, to petitioner's argument, an examination of relevant statutes and case law clearly establishes that the Eleventh Circuit was correct in concluding that the State prosecution sought to vindicate rights "equivalent to" those provided by the Federal Copyright Act. Accordingly, it appropriately applied the doctrine of preemption.

17 U.S.C. § 301 specifically states: "[A]ll legal or equitable rights that are equivalent to any of the exclusive rights within the general scope of copyright" (emphasis added), are governed solely by the Federal Copyright Act. There has never been any dispute that the activity engaged in by respondent, in

his unauthorized reproduction of Ms. Wynette's sound recording, constituted a violation of that Act. See 17 U.S.C. § 506 (a); United States v. Smith, 686 F.2d 234 (5th Cir. 1982); United States v. Malicoate, 531 F.2d 439, 440 (10th Cir. 1975); Fame Publishing Co. v. Alabama Custom Tape, 407 F.2d 667 (5th Cir. 1975).

The real question, then, is whether the federal preemption mandated by 17 U.S.C. § 301 is applicable herein where the official charge was "dealing in stolen property," rather than some other charge which more accurately describes the actual activity of selling a bootleg tape. Simply put, because the state proceeding constituted enforcement of a "legal or equitable right" that was "equivalent to any of the exclusive rights" within the Copyright Act, the federal preemption is still applicable.

The actual label placed upon respondent's activity is unimportant here, for as noted by one commentator:

> [When is such a [state] right "equivalent" to one of the rights set forth in Section 106? Is it necessary that a state created right be exactly coextensive with a federally created right under Section 106 in order for such a state right to be preempted? Suppose the state created right is broader than its federal counterpart. For example, the performance right under Section 106(4) is limited to public performances. Would a state created right which required the author's consent for private as well as public performances be immune from preemption because it is not "equivalent" to the federal right? Clearly such a state created right would be the subject of preemption. "The preemption of rights under State law is complete ...even though the scope of exclusive rights given the work under the [Copyright Act] is narrower than the scope of common-law rights in the work might have been." What if the state created right is not broader than the comparable federal right, but simply complementary to it? For example, what of a state law that protected only as against the public performances, leaving the federal remedy available for public performances? It seems clear that such a law would

> also be preempted. "The intention of section 301 is to preempt and abolish any rights under the common law or statutes of a State that are equivalent to copyright ..." Thus, the reference to Section 106 in the Section 301 phrase "equivalent to any of the exclusive rights within the general scope of copyright as specified by Section 106" is by way of identification and not limitation. If a state created right is "within the general scope of copyright" it is subject to preemption, even if the precise contours of the right differ from any of those contained in Section 106.

1 Nimmer On Copyright, 1-9, 1-10 (1981 ed.) (Footnotes ommitted)(Emphasis in original).

An examination of the legislative history of the Copyright Act similarly supports respondent's position. As originally drafted, 17 U.S.C. § 301 (b)(3) read:

> Nothing in this title annuls or limits any rights or remedies under the common law or statutes of any State with respect to--
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> . . . .

> Activities violating rights that are not equivalent to any of the exclusive rights within the general scope of copyright as specified by Section 106, including breaches of contract, breaches of trust, invasion of privacy, defamation, and deceptive trade practices such as passing off and false representation.

H.R. Rep. No. 4347, 89th Cong., 2d Sess. 24 (1966). When presented to the House of Representatives for enactment, the act was amended so as to add several additional state created rights which were said to be immune from federal preemption. These additional state rights included:

> [A]ctivities violating legal or equitable rights that are not equivalent to any of the exclusive rights within the general scope of copyright as specified by Section 106, including rights against misappropriation not equivalent to any of such exclusive rights, breaches of contract, breaches of trust, trespass, conversion, invasion of privacy, defamation, and deceptive trade practices such as passing off and false representation.

S. Rep. No. 22, 94th Cong., 2d Sess. (1976). When the Act came before the House for passage, however, all references to state remedies were deleted and 17 U.S.C. § 301 was passed in its present form.

The preemptive force of 17 U.S.C. § 301 has been, as the Committee Reports have unfailingly stated since 1966, "one of the bedrock provisions of the bill." H.R. Rep. 2237, 89th Cong., 2d Sess. 125, 129 (1966). With considerably more force than in the previous copyright statute, Congress now has made a general preemptive statement. The legislative history of 17 U.S.C. § 301 indicates that only those state causes of action which seek to vindicate rights different in nature from those granted by the copyright monopoly may survive preemption. H.R. Rep. No. 1476, 94th Cong., 2d Sess 132 (1976).

The intention of 17 U.S.C. § 301 is to preempt and abolish any rights under the common law or state statutes that are equivalent to copyright and that extend to works coming within the federal copyright law. The language of 17 U.S.C. § 301, embodying this principle, is intended to be the most unequivocal language possible so as to foreclose any misinterpretation of its unqualified intention that Congress shall act preemptively and to avoid the development of any vague, borderline areas between state and federal protection.

Despite the clear intent of Congress, petitioner argues that "similar rights" have been vindicated by the State with the approval of the federal courts. In doing so, it relies upon cases where there existed no federal protection of the right sought to be vindicated.

For instance, the case of Zacchini v. Scripps-Howard Broadcasting Co., 433 U.S. 562 (1977), dealt solely with the issue of whether the news media was "constitutionally privileged to include in its newscasts matters of public interest that would otherwise be protected by the right of publicity." Id. at 569. Thus, Zacchini has absolutely no relevance to the preemption issue before this Court.

Similarly, the reasoning of Aronson v. Quick Point Pencil Co., 440 U.S. 257 (1979) is not applicable. In that case, the inventor of a new keyholder applied for patent protection. While her application was pending, she negotiated a contract for the manufacture and sale of the device with Quick Point Pencil Co. This contract specifically contemplated the contingency that the device might not be patentable. A patent for the device

was in fact denied and royalties were paid as agreed upon in the contingent agreement. After many years of paying royalties for the device, Quick Point Pencil Co. sought to have the contract declared unenforceable, asserting that the state law which would make the contract enforceable was preempted by the federal patent laws. In enforcing the terms of the contract, this Court noted that the contract was made with absolutely no reliance on the patent statute. Id. at 303-304. This Court further noted that a patent was never granted and hence, the State was not seeking to vindicate any right already protected by the federal patent law.

In contrast, the instant case involved no contractual agreement between the parties. Moreover, the "rights" allegedly stolen by respondent were precisely the rights protected by the Copyright Act and

thus, any state law regarding the subject was preempted by it. See Compco Corp. v. Day-Brite Lighting, 376 U.S. 234 (1964) (when an article is unprotected by a patent or copyright, state law may not forbid others to copy that article); Sears & Roebuck Co. v. Stiffel, 376 U.S. 225 (1964)(state may not prevent the copying of unpatentable articles, since to do so would conflict with federal patent law).

Petitioner similarly misinterprets the impact of Goldstein v. California, 412 U.S. 546 (1973). At the time Goldstein arose there existed no federal copyright protection to prevent the pirating of sound recordings. Additionally, because that case was decided under

the previous Act, there existed no explicit statute expressing the intent of Congress that state law in this area be preempted. Given these facts, this Court held that state law proscribing the unlawful copying of sound recordings was not preempted. In enacting the Copyright Act of 1976, Congress clearly resolved the issues raised in Goldstein in favor of preemption. Accordingly, the legal standard of Goldstein does not establish a conflict justifying the granting of jurisdiction by this Court.

Nor does the Eleventh Circuit's opinion below conflict with state law. The courts of the State of Florida have previously recognized, with regard to musical recordings subsequent to

February 15, 1972, 3/ that federal legislation has preempted any and all state authority in the criminal field for Copyright Act violations. State v. Gale Distributors, Inc., 349 So.2d 150, 152 (Fla. 1977). In Gale, the Florida

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3/ The date of February 15, 1972, is siginificant due to 17 U.S.C. § 301(c), which provides:

> With respect to sound recordings fixed before Feburary 15, 1972, any rights or remedies under the common law or statutes of any State shall not be annulled or limited by this title [17 USCS §§ 101 et seq.] until February 15, 2047. The preemptive provisions of subsection (a) shall apply to any such rights and remedies pertaining to any cause of action arising from undertakings commenced on and after February 15, 2047. Notwithstanding the provisions of section 303 [17 USCS § 303], no sound recording fixed before February 15, 1972, shall be subject to copyright under this title [17 USCS §§ 101 et seq.] before, on, or after February 15, 2047.

Supreme Court specifically addressed the validity of a state statute which proscribed the unauthorized copying of sound recordings "fixed" prior to February 15, 1972, and noted:

> Since we find no violation of the Supremacy Clause of the Constitution of the United States so long as the act is construed to apply to recordings "fixed" before February 15, 1972, we have for disposition the challenge of vagueness against the constitutionality vel non of Section 543.041(2)(b).

Id. at 153 (Emphasis added). Accordingly, there is no basis for this Court to accept jurisdiction in this case.

CONCLUSION

This Court should not invoke its jurisdiction to review this case. There is no conflict between the decision below and other authority which would justify review herein. The rights sought to be vindicated by petitioner in prosecuting respondent for his unauthorized reproduction of a sound recording were "equivalent to" those protected by the Federal Copyright Act. Accordingly, this Court should decline to review the decision of the Eleventh Circuit Court of Appeals below.

Respectfully submitted,

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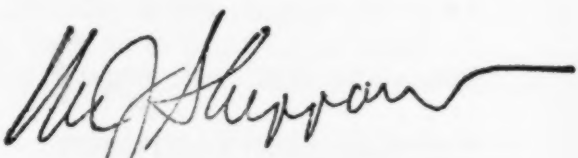
CERTIFICATE OF SERVICE

I hereby certify that a copy of this Brief in Opposition has been furnished to Gregory C. Smith, Esquire, Assistant Attorney General of Counsel, The Capitol, Tallahassee, Florida, 32301-8048, by depositing same in a United States post office or mail box with first-class postage prepaid, this 22nd day of May, 1984.



Wm. J. Sheppard